OTHMAN TUANA

v.

BASERI HAMID & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[CIVIL SUIT NO. A 11 OF 1985]
29 APRIL 1986

CIVIL PROCEDURE: *Power of attorney - Authentication - Section 3 of the Power of Attorney Ordinance 1949 - Construction of instrument.*

In May 1983, the 2nd defendant (Oriental Bank Bhd.) granted overdraft facilities to one Sri Midah Enterprise and as security for the loan, the 1st defendant (the managing partner of Sri Midah Enterprise) charged two pieces of land belonging to the plaintiff, to the Bank. In September 1984 the Bank gave notice of breach in accordance with the National Land Code as Sri Midah Enterprise had failed to pay on demand the outstanding amount. The Collector, on 21 March 1985, after due inquiry, ordered the sale of the lands by public auction; this was held on 15 May 1985 but was aborted as there were no bidders.

In charging the lands to the Bank, the 1st defendant used a power of attorney granted to him by the plaintiff on 18 March 1983. This power of attorney was duly registered at the relevant offices. The plaintiff contends that he never executed the power of attorney and that the 1st defendant obtained the land titles from him under false pretences. In addition, the plaintiff also contends that the power of attorney was not lawfully attested pursuant to s. 3 of the Power of Attorney Ordinance 1949 ("the Ordinance") and was therefore void. It is also argued that even if the power of attorney was valid, it did not confer any power on the 1st defendant to charge the lands for the benefit of a third party.

Held:

[1] The Court found no evidence whatsoever that the thumb-print on the power of attorney was a forgery and taking into consideration all the surrounding circumstances, the Court held that the plaintiff did execute the power of attorney in favour of the 1st defendant.

[2] The form of authentication in the power of attorney was carried out in accordance with the First Schedule of the Ordinance and the power of attorney was held to be valid under s. 3 of the Ordinance.

[3] On a fair construction of the instrument in question and on the authority of *Bank of Bengal v. Ramanathan Chetty & Ors.* [1915] PC 121 the first defendant had authority under the power of attorney to charge the plaintiff's lands to the 2nd defendant Bank to benefit a third party.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Hew Kee Yin [1962] MLJ 249
Dottie Karan & Ors. v. Lachmi Prasad Sriha & Ors. [1930 - 31] IA 58
Bryant, Powis and Bryant Ltd v. La Banque Du Peuple [1893] AC 170
Bank of Bengal v. Ramanathan Chetty & Ors. [1915] PC 121

Legislation referred to:
Powers of Attorney Ordinance 1949, s. 3

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the 2nd defendant - Tony Dhana; M/s. Zain & Co.

JUDGMENT

Harun Hashim J:

In May 1983, the Oriental Bank (second defendant bank) granted overdraft facilities to Sri Midah Enterprise. As security, the managing partner of Sri Midah Enterprise (Baseri b. Hamid, the first defendant) charged two pieces of land belonging to Othman b. Tuana (the plaintiff). In September 1984 the Bank gave notice of breach in accordance with the provisions of the National Land Code, as Sri Midah Enterprise failed to pay on demand the outstanding amount. After due inquiry, the Collector on 21 March 1985 ordered the sale of the lands by public auction. The public auction was held on 15 May 1985. It was aborted as there were no bidders.

In charging the lands to the Bank, Baseri used as a power of attorney granted to him by Othman on 18 March 1983. This Power of Attorney was duly registered at the High Court Registry in Kuala Lumpur on 22 March 1983 and at the Land Office Sabak Bernam on 7 April 1983.

Othman now says that he did not execute the power of attorney; the thumb-print affixed thereon is not his; and Baseri obtained the land tiles from him under false pretences. Further and or in the alternative, it is contended that the Power of Attorney is not lawfully attested pursuant to s. 3 of the Power of Attorney Ordinance 1949 and is therefore void. And if valid, it did not confer any power on Baseri to charge the lands to the benefit of a third party.

Fraud, forgery and false pretence

Othman purchased the two pieces of land planted with coconuts in December 1965. According to him, about 3 or 4 years ago, Baseri, who is a nephew of his, came to his house to borrow some money. He did not have the money. Baseri then said he wanted to borrow the land titles for a short while only as he wanted to apply for a licence to distribute flour, sugar and rice. He gave Baseri the titles. After that Baseri, who used to be a regular visitor to his house did not visit him again. He looked for Baseri but could not find him. He left messages with Baseri's father but to no avail. He even went to Tanjung Malim to look for Baseri but without success. The next thing he knew was when he received a letter from the Bank demanding payment. He attended the inquiry at the Land Office and was asked to give his consent to auction the lands but he refused. He did not at any time visit a solicitor's office to execute the power of attorney nor did he consent to charge the lands to the Bank.

Baseri did not give evidence. He did not enter an appearance, although he was personally served with the Writ on 5 August 1985.

A solicitor (En Mohd. Nazri) said that the power of attorney was executed in his office. He personally checked Othman's identity card and explained the contents of the document to him. Othman's thumb-print was affixed in his presence and he attested the document.

I find that there is no evidence whatsoever that the thumb-print on the power of attorney is a forgery. I accept the evidence of the solicitor that Othman affixed the thumb-print in his presence. It is said that Othman is a simple, illiterate kampong person. I do not think so. In his letters to the Bank's solicitors before he consulted a solicitor, he did not allege fraud or forgery. All he said was that as Sri Midah Enterprise had used the money for its business,

it was only fair that the firm should be made to repay the loan. Even at the inquiry in the Land Office, he did not allege fraud. According to the Collector (En. Mohd. Ahir), Othman did not object to the sale but did say that Baseri ought to settle the Bank loan but if he could not, what could be done. I accordingly find that the plaintiff did execute the power of attorney in favour of the first defendant.

Authentication of Power of Attorney

Section 3 of the Powers of Attorney Ordinance 1949 (the Ordinance) provides that no instrument purporting to create a power of attorney shall have any validity to create such power within the Federation unless -

> if executed within the Federation, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule by (amongst others) an advocate and solicitor.

In the instant case the power of attorney was executed in Kuala Lumpur before and authenticated by an advocate and solicitor. The form of authentication in the power is in accordance with the First Schedule. It is contended, however, that if the donor is not personally known to the solicitor then he should be identified by two trust-worthy and respectable persons. In the instant case only one such person (Berahim b. Yot) did so. The space for the other person is left blank. It is argued that the power of attorney is therefore not properly authenticated and accordingly not valid under s. 3 of the Ordinance on the authority of *Hew Kee Yin* [1962] MLJ 249. In my view this authority does not assist the plaintiff because the decision of that case is based on the particular interpretation of a provision in the Land Code regarding attestation of a Memorandum of Transfer. The case of *Dottie Karan & Ors. v. Lachmi Prasad Sriha & Ors.* [1930 - 31) IA 58 does not assist either because that case concerned registration of a power of attorney, not authentication.

In my view the object of authentication under the Ordinance is two-fold viz:

(a) To ascertain the identity of the donor; and

(b) The donor has voluntarily executed the instrument.

In the present case the solicitor in his evidence testified that he personally checked the identity card of Othman, the full particulars of which are recorded in the power of attorney. This act coupled with the identification by Berahim b. Yot substantially meets the requirements of identification by two persons. There can be no doubt in this case that the plaintiff is the donor of the power of attorney. I accordingly hold that the power of attorney is valid under s. 3 of the Ordinance.

Right to create charge to benefit Third Party

The power of attorney *inter alia* provides-

> C1.8 - To manage and conduct my business in held under EMR. No. 332 Lot 18 and EMR. No. 5 Lot 17 Mukim of Sungai Panjang.
>
> C1.10 - To charge or mortgage any of my said lands and movable property and for that purpose to sign all necessary charges and other documents.
>
> C1.11 - To borrow such sums of money and upon such terms as my said Attorney shall deem expedient upon my personal security or the security of any of my property movable and immovable in
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> and for such purpose to give and execute such mortgages, charges, bills of sale, pledges, promissory notes, bills of exchange, guarantee or other securities, and with such powers and provisions as may be thought proper.

It is argued on behalf of the plaintiff that under cl. 8, the only business to be managed is in relation to coconuts and the power to charge under cl. 11 does not apply because it is left blank. In any event there is no power to create a charge for the benefit of a Third Party, *viz.* Sri Midah Enterprise. Numerous cases have been cited in argument on this point, but with respect, I think they do not assist the plaintiff as the facts or the law are different except the Canadian case of *Bryant, Powis and Bryant Ltd. v. La Banque Du Peuple* [1893] AC 170 where in the Privy Council it was not disputed

> that powers of attorney are to be construed strictly - that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

This canon of construction was applied by the Privy Council in the Burmese case of *Bank of Bengal v. Ramanathan Chetty & Ors.* [1915] PC 121. The Burmese case also established two matters relevant to our case, *viz:*

(a) That oral evidence may be given to determine whether the attorney had authority to act in the manner challenged; and

(b) If the authority is established the mere fact that the donor did not receive any benefit does not rid him of his liability.

Applying these authorities to the facts of the instant case, and on a fair construction of the whole instrument within its four corners shows that there is nothing to prohibit Baseri from charging the lands to the Bank as security for the loans given to Sri Midah Enterprise. A plain reading of cl. 10 of the power in fact gives him *carte blanche* to do so. The plaintiff in his evidence had said that he lent the titles to Baseri to assist Baseri in his business. In his statement of claim the plaintiff states that Baseri is the managing partner of Sri Midah Enterprise. He must know that the titles could only be intended as security. The plaintiff himself had charged the titles to Bank Kerjasama Rakyat in 1972 as security for a loan. Further, the solicitor had asked him in the presence of Baseri and the witness the purpose of the power and had said that he wanted to give the power in connection with his lands. There was no need to grant the power to manage the coconuts as the plaintiff was doing that himself. Clause 8 can only mean giving full authority to Baseri to deal with the land titles as he wished in connection with his business *viz.* Sri Midah Enterprise. True, on the evidence the plaintiff has not received any benefit but on the authority of the Burmese case he is not rid of liability. With cl. 8 and 10 read together, cl. 11 is irrelevant.

I therefore hold that the first defendant had authority under the power of attorney to charge the plaintiff's lands to the second defendant to benefit a third party (Sri Midah Enterprise). I would answer the three declarations sought by the plaintiff in the negative and dismiss this claim with costs.

Also found at [1986] 2 CLJ 39